NO. 5742

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL FALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

WILLIAM N. WAUGH,

Attorney for Appellant.
Butte, Montana.

INDEX.

TABLE OF CASES.

STATUTES AND CONSTITUTIONAL PROVISIONS

NO. 5742

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL FALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

STATEMENT OF THE CASE.

On November 26th, 1928, an information was filed in the United States District Court for the District of Montana, which was in five counts, and separately charged the Defendant, Paul Fall,

> 1st. With having on the 22nd day of September, 1928, in Silver Bow County, Montana, sold wrongfully and unlawfully, intoxicating liquor, to-wit, whiskey;
>
> 2nd. With having, on the 25th day of October, 1928, wrongfully and unlawfully manufactured intoxicating liquor, to-wit: whiskey;

3rd. On the same day, with having wrongfully and unlawfully had and possessed property designed for the manufacture of intoxicating liquor;

4th. On the same day, with having wrongfully and unlawfully in his possession, intoxicating liquor, to-wit, whiskey;

5th. On the same day with having wrongfully and unlawfully maintained a common nuisance. (T. 1-5.)

The Defendant entered a plea of not guilty.

The said case was set for trial, and thereupon the defendant filed with the said court, a motion to quash search warrant, and suppress evidence. The said motion asked the Court to quash Search Warrant which had previously been issued by United States Commissioner for the District of Montana, L. M. Van Etten, and by virtue of which the search had been made of the dwelling house of the defendant and the search made of the dugout near thereto and under which a certain quantity of whiskey had been seized in the dwelling house, and a certain amount of whiskey and two stills and other equipment had been seized in said dugout.

Said motion also asked the court to quash the so-called complaint and application for said search warrant, and pretended supporting affidavit of James J. Maloney, and the evidence procured by means of said so-called search warrant.

The said motion was made upon the grounds:

1st. That the said so-called complaint and application for search warrant were defective and un-

lawful in that they failed to particularly describe the place to be searched;

2nd. They did not contain a statement of evidentiary facts but merely alleged conclusions;

3rd. That so-called supporting affidavit of James J. Maloney was not subscribed to and sworn to in the presence of said Commissioner;

4th. That said supporting affidavit was insufficient in that it failed to particularly describe the place to be searched;

5th. That the time alleged in said affidavit of the alleged sale of whiskey was too remote;

6th. That said alleged supporting affidavit, application and complaint did not comply with the Constitution or Laws of the United States. (T. 18-23.)

The said motion was noticed for hearing for the 28th day of December, 1928, and on the said day the said motion was called to the attention of the Court. The said case came on for trial and said motion was again called to the attention of Court, who said that the said motion would be taken up and heard in the course of the trial, and if the evidence was found to be incompetent it would be excluded in consideration of the case and the Defendant would be given the benefit of said motion. It was thereupon understood and agreed that all evidence offered by the Government would go in, subject to said motion (T. 24). Thereupon the trial of said case proceeded, trial being had to the Court without a jury.

The affidavit of James J. Maloney just referred to was sworn to before J. H. Brass, United States Commissioner for the District of Montana on the 27th day of Septem-

ber, 1928, and was to the effect that on the 22nd day of September, 1928, he had purchased from the defendant a pint of whiskey and paid for it the sum of $5.00 (T. 41, lines 1-5). He and F. S. Chase testified for the Government that on the said day they had entered into a contract for the purchase from the Defendant of 40 gallons of moonshine whiskey, delivery to be made in the future, and deposited the sum of $5.00 on account of the purchase price. (T. 25-27.)

Except for the testimony of Chase and Maloney the evidence on the part of the government consisted entirely of the testimony of Ben Holter, who testified that he had made a search by virtue of said warrant. The search was made of the said dwelling house and they found a small quantity of whiskey there and found also in the dugout, a short distance from the house, an additional quantity of whiskey, mash and certain stills and other paraphernalia. (T. 28-29.)

Said complaint and application for search warrant and supporting affidavit were filed in the case and heard and considered on the trial (T. 38-46). L. M. Van Etten, Commissioner of the District of Montana, testified on behalf of the defendant to the effect that said James J. Maloney did not appear before him and was not examined by him and that said complaint and application for search warrant and affidavit of James J. Maloney were all the evidence heard and considered by him, and that upon them he issued said search warrant (T. 29-30). The defendant and his wife gave testimony on behalf of the defendant.

The case was argued to the Court, who overruled said motion to quash and suppress said evidence and the said complaint and application for search warrant and supporting affidavit of James J. Maloney and the said search warrant, and found defendant guilty upon all of said five counts and sentenced him to imprisonment for four months on counts one and two, and to an additional four months imprisonment on count five, and to pay a fine of $250 on counts three and four (T. 6-7), from which judgment of conviction defendant has appealed.

SPECIFICATION OF ERROR.

1. The Court erred in denying the motion of defendant to quash said search warrant.

2. The Court erred in overruling motion to quash said affidavit of James J. Maloney, the complaint and application for search warrant.

3. The Court erred in denying the motion of Defendant to suppress evidence which was procured by virtue of said warrant.

4. The Court erred in overruling the objection of the Defendant and admitting testimony of Ben Holter.

5. The Court erred in overruling objection of Defendant to testimony of Ben Holter, which was as follows:

> "I was out at his place the other side of Silver Bow junction and assisted in a search thereof on the 25th day of October, 1928, with Prohibition agents H. Donald Dibble and F. S. Chase."

6. The Court erred in overruling objection of defendant permitting the witness Ben Holter to testify as follows:

> "We first searched the house, a one-room frame, and we found some whiskey in there and took samples of it."

7. The Court erred in overruling objection of defendant permitting witness Ben Holter to testify as follows:

> "There was only a small quantity in the keg."

8. The Court erred in overruling the objection of defendant permitting the said Ben Holter to testify as follows:

> "We then searched the dugout, some little distance from the house and found there two stills set up complete. One a forty-five gallon and one a sixty gallon; about six hundred gallons of mash, two three hundred gallon vats, and some kegs, burners, and pressure tanks complete and about thirteen gallons of moonshine whiskey."

9. The Court erred in holding that evidence procured on account of said search was legally procured.

10. The Court erred in finding Defendant guilty on the second count, and in pronouncing judgment against him on said count.

11. The Court erred in finding defendant guilty on the third count and pronouncing sentence against him upon said count.

12. The Court erred in finding defendant guilty on the 4th count and pronouncing sentence against him upon said count.

13. The Court erred in finding Defendant guilty on the 5th count and pronouncing sentence against him upon said count.

14. The Court erred in holding and deciding that said application for search warrant was not defective.

15. The Court erred in holding and deciding that the search of defendant's residence and dugout was legal.

16. The Court erred in holding and deciding that said affidavit in support of search warrant was not defective.

17. The Court erred in holding and deciding that complaint and application for search warrant and affidavit for search warrant were not defective.

18. The Court erred in holding and deciding that search warrant produced in evidence was in due form of law and was not defective.

19. The Court erred in holding and deciding that there was sufficient showing of probable cause to warrant the issuance of said warrant.

20. The Court erred in rendering a judgment of conviction herein against defendant upon counts 2, 3, 4 and 5 of said information.

21. The Court erred in pronouncing sentence against Defendant jointly upon counts 1 and 2 of said information.

BRIEF OF ARGUMENT.

The contention of appellant is that all of the evidence procured by virtue of said search warrant was procured in violation of the Constitution and laws of the United States and for that reason should not have been received or considered by the Court and that as a consequence there could have been no conviction upon either of counts 2, 3, 4 or 5 of the information and as a consequence also the sentence pronounced jointly upon counts 1 and 2 of the information is erroneous and must be reversed.

There are three particulars in which the proceedings which resulted in said search warrant and the said search warrant itself were defective and there was no proper foundation for the issuance of said search warrant.

The language of the

Fourth Amendment to the Constitution of the United States is as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States upon which we also base our contentions contains a clause to the effect that

"No person * * * shall be compelled in any criminal case to be a witness against himself."

The provisions of the

Espionage Act, (40 Stat. 228) U. S. C. A.—Tit. 18; Sec. 611 to 631.

made applicable under the provisions of the National Prohibition Act (41 Stat. 315; U. S. C. A.—Tit. 27—Sec. 39) are:

"A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."

"The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their deposition in writing and cause them to be subscribed by the parties making them."

"The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing they exist."

"If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause of its issue and the names of the persons whose affi-

> davits have been taken in support thereof, and commanding him forthwith to search the person or place named for the property specified and to bring it before the judge or commissioner."

It is unnecessary to cite authorities to the effect that evidence procured by virtue of a search warrant which was procured other than as prescribed by said Constitution and statutory provisions cannot be made the foundation of a conviction in a criminal case. Numerous authorities referred to in the course of this brief are to that effect.

ONE

THE SEARCH WARRANT IN QUESTION AND EVIDENCE UPON WHICH IT WAS BASED DID NOT DESCRIBE THE PLACE TO BE SEARCHED WITH THE REQUIRED PARTICULARITY.

The search warrant in question did not describe the place to be searched as either owned or occupied by the defendant. The only description given is in the following language:

> "A ranch with small building used for residence located about 5 miles in a westerly direction from the town of Silver Bow, Montana."

The court will notice judicially the fact that the vicinity of Silver Bow, Montana, is a ranch country

Sligh vs. Kirkwood, 237 U. S. 52;

Laughter vs. McLain, 229 Fed. 280;

and many ranches could no doubt be found within a dis-

tance of about 5 miles in a westerly direction from said place. The affidavit for search warrant and complaint and application for search warrant were also in like manner indefinite. (T. 39, lines 3 to 5; 40, lines 29 to 31.)

The statute referred to declares that the search warrant shall not be issued but on affidavit particularly describing the place to be searched.

In

United States vs. Alexander, 278 Fed. 308,

a search warrant which commanded the officers to search the premises at "corner of Davidson and Ashleigh Streets, Jacksonville, Florida, being the premises of Jim Alexander," was held to be invalid because the premises were not particularly described, it being pointed out that at the intersection of Davidson and Ashleigh Streets, there were 4 corners, any one of which might be searched under the description furnished.

In

United States vs. Rykowski, 267 Fed. 866,

the description given in the affidavit in support of the application for search warrant and in the search warrant itself was the "premises of William Kozlar, 123 Garfield Street, in Dayton, Ohio." It appeared that there was both a North and South Garfield Street in the place referred to. It was held that the warrant was invalid because it did not contain a particular description of the place to be searched.

In

United States vs. Innelli, 286 Fed. 731,

the premises to be searched were described by street and number and the premises in question were composed of several floors, only one of which was occupied by the defendant and it was held that the warrant was invalid because of insufficient description. In passing upon the question the Court said:

> "If the place described by street and number is used by different persons for different purposes, then it is not a place; but there are several places included in the one description and it is then a general but not a particular description."

TWO.

THE APPLICATION FOR THE SEARCH WARRANT MUST BE BASED UPON COMPETENT EVIDENCE AND THE OFFICER ISSUING THE SEARCH WARRANT MUST HIMSELF HEAR THE TESTIMONY UPON WHICH THE APPLICATION IS FOUNDED.

In

Siden vs. United States, 9 Fed. (2d) 241,

the complaint upon which a search warrant was issued was verified by a Mr. Benson, before the Commissioner who issued the warrant. It was made upon information and belief and had annexed to it an affidavit made positively by one Herman Miller, to a purchase of intoxicating liquor. The search warrant was held to be invalid and a judgment of conviction was reversed.

The principle involved in the decision last referred to was also recognized in the following cases:

United States vs. Kelih, 272 Fed. 484;

Queck vs. Hawker, 282 Fed. 942;

Veeder vs. United States, 252 Fed. 414;

Giles vs. United States, 284 Fed. 208;

and in

People vs. Perrin, 193 NW. 888;

People vs. Woodhouse, 194 NW. 545;

and

People vs. Fons, 194 NW. 543;

the supporting affidavit was not made before the officer who issued the warrant, and so was held not entitled to be considered.

In

Giles vs. United States, Supra,

the law was stated in the following language:

> "A commissioner having presented to him affidavits or evidence of the violation of a criminal statute, accompanied by a request for a search warrant, in considering such evidence, acts in a judicial capacity and should issue such warrant only upon competent evidence such as would be admissible upon the trial of a case before a jury. The finding of probable

cause for the issuance of a search warrant is one exclusively for the court or commissioner having the matter in charge."

In

People vs. Fons, Supra,

the law applicable was stated in the following language:

"The question is whether the affidavit, not having been taken before the magistrate can be used for such purpose. We think it can not. In determining probable cause, the magistrate is called upon to perform a judicial act: He must have before him for examination the witness who claims to have personal knowledge of the facts. The affidavit which is required to be taken before him in writing is the result of his examination; it is an important and necessary record of the legal evidence upon which he acts in determining probable cause for the issuance of a search warrant. The warrant does not issue from the mere fact of the filing of an affidavit, but from the finding of a good cause based on legal evidence. The law contemplates a showing before a magistrate, such a showing as satisfies him that a crime has been committed. As there was no such showing in this case, the validity of the search warrant cannot be sustained."

The law is also stated in

Cornelius on Search and Seizure, 277,

as follows:

"But where the showing of probable cause is made

by the affiant based on information and belief induced by another affidavit positive in form, but not sworn to before the magistrate who issued the search warrant, the same is insufficient."

THREE.

IF THE AFFIDAVIT OF JAMES J. MALONEY WAS NOT OBJECTIONABLE OTHERWISE, IT WOULD BE INSUFFICIENT BECAUSE OF THE REMOTENESS IN TIME OF THE FACTS ALLEGED.

Maloney in his affidavit states that on September 22nd, 1928, he bought a pint of whiskey from the defendant and the search warrant in question was issued on the 25th day of October, 1928. If the statements of the affidavit were taken as true, and if there had been, in fact, a pint of whiskey sold on September 22nd, 1928, that was no evidence that there was whiskey in the same premises on the 25th day of October following.

In

Siden vs. United States, Supra,

in passing upon a similar question, the Court said in the opinion:

"Nor did the isolated fact that Mr. Miller bought three drinks of moonshine whiskey from the defendant at the clothing store on November 19th, 1922, establish probable cause to believe that on December 1st, 1922, the defendant was unlawfully in pos-

session of intoxicating liquor at that place, and his affidavit states no other facts tending to establish such probable cause."

In

People vs. Mushlock, 198 N. W. 203,

the affidavit as to the purchase of liquor three weeks previous to the date upon which the search warrant was issued was held to be so far remote as not to show probable cause. In delivering the opinion in the case, the Court said:

"There is no hard and fast rule as to how much time may intervene between obtaining the facts and the making of the affidavit upon which the search warrant is based, but it may be stated that the time should not be remote. This question was considered in the opinion filed March 5, 1924, in the case of the People vs. Chippewa Circuit Judge (Mich.), 197 NW. 539. We think that case is controlling of the instant case and that the search warrant was improvidently issued."

For the several reasons assigned, all of the evidence upon which a conviction was had upon the 2nd, 3rd, 4th and 5th counts of the information was not properly receivable by the Court and should have been excluded. There was, therefore, no evidence to support the judgment of conviction as to the said four counts of the information.

By said judgment, sentence was imposed jointly upon the conviction of the 1st and 2nd counts of the said in-

formation and as there should have been no conviction upon said 2nd count, the entire judgment should be reversed.

The propositions of law for which we have contended are supported by an unbroken line of authorities. There can be no doubt about what the law applicable to the case is. There is no ptetense that there had been any consent on the part of the defendant to search his premises or that there was any waiver on his part as to his Constitutional rights.

The authorities to which we have referred contain expression of opinion of the Judiciary generally, throughout the country, respecting the evils which will arise through unlawful search and seizure. The salient features of the present case emphasize in a very striking way the tendency to disregard the Constitutional restrictions with respect to the search of the private property of an individual and to disregard also the statutes which have put into statutory form what would otherwise exist in the shape of judicial constructions of the said provisions of the Constitution.

Appellant respectfully submits that the judgment of conviction appealed from should be reversed.

Respectfully submitted,

WILLIAM N. WAUGH,

Attorney for Appellant.